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JAMES H. McKENNE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 201.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY ET AL., APPELLANTS,

vs.

THE INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE APPELLANTS IN REPLY TO THE SUPPLEMENTAL BRIEF FOR THE APPELLEE.

LAWRENCE MAXWELL, JR.,
EDWARD COLSTON,
Counsel for the Appellants.

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1.

NO PLEADINGS NECESSARY BEFORE THE COMMISSION.

Section 13 of the commerce act provides:

"Said Commision * * * *may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.*"

2.

If pleadings were necessary, the answers of the defendants to the complaint before the Commission put in issue the reasonableness of the class 3 less 20 per cent rate as applied to L. C. L. soap.

The complaint before the Commission, so far as the advance in classification of L. C. L. soap was concerned, related to the class 3 rate. But the defendants, after the complaint had been filed, abandoned the class 3 rate and substituted therefor the class 3 less 20 per cent rate, and in their answers filed before the Commission they set up this class 3 less 20 per cent rate, and *alleged that it was a reasonable rate.*

In the answer of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company it is alleged:

"That the classification of soap, which became effective on March 10, 1900 (the class 3 less 20 per cent rate), established *reasonable* and relative rates for the service to be performed in the transporta-

tion of said article (L. C. L. soap); that said revised classification *will not subject complainant or the traffic in soap to any undue or unreasonable prejudice or disadvantage and will not be in violation of any of the provisions of the act to regulate commerce.*" (R., bot. p. 20.)

See, also, answers of Lake Shore and Michigan Southern Rwy. Co., R., 25.

New York Central and Hudson River Rwy. Co., R., 31.

B. and O. S. W. R. R. Co., R., 40.

The reasonableness of this class 3 less 20 per cent rate was contested before the Commission by the complainants, the Proctor & Gamble Company, and it became the sole issue so far as L. C. L. soap was concerned.

The testimony before the Commission and in the court below relates to this class 3 less 20 per cent rate, and the Commission in its order in question in this case forbids that rate, the language of the order being that the defendant railway companies "cease and desist on or before the 15th day of June, 1903, from charging, demanding, collecting, or receiving for the transportation of common or laundry soap in less than carload quantities charges or rates per hundred pounds *equal to 20 per cent less than rates fixed by them for the transportation of articles designated as third class in their established freight classification*, called and known as the 'Official Classification,' which said 20 per cent less than third-class rates for the transportation of common or laundry soap in less than carloads are found and determined in and by said report and opinion of the Commission to be in violation of the act to regulate commerce."

3.

In the brief filed by the attorney for the Baltimore and Ohio Southwestern Railroad Company and the Baltimore and Ohio Railroad Company before the Commission the following statement is made as to the nature of the complaint before the Commission:

"Stripped of verbiage, the complaint is that carload soap by being placed in fifth class and less than carload soap by being placed in third class, 20 per cent off (Official Classification No. 20, effective January 1, 1900, modified March, 1900), *is subjected to unjust and unreasonable charges for transportation services rendered.*"

The defendants had their "day in court" before the Commission on this question and should be held to be estopped from denying that the reasonableness of the class 3 less 20 per cent rate was in issue before the Commission.

4.

ISSUE UNDER THE PLEADINGS IN COURT.

The proceedings in court being *de novo*, the question is What is the issue presented by the pleadings in court? The bill of complaint filed by the Interstate Commerce Commission in the court below, in Paragraph IX, alleges—

That the action of the defendants (appellants) in raising the classification of common or laundry soap L. C. L. from class 4 to class 3 less 20 per cent resulted in unreasonable and unjust rates in violation of section 1 of the act to regulate commerce, and also in an undue and unreasonable

preference and advantage, and in an undue prejudice and disadvantage in violation of section 3 of that act. (R., 4.)

The defendants, in their answers filed in court, traverse these allegations.

Ans., B. & O. R. R. Co., R., 88.
Ans., B. & O. S. W. R. R. Co., R., 90.
Ans., Cinn., H. & D. Ry. Co., R., 103.
Ans., N. Y. Cent. & H. R. R. Co., R., 93.
Ans., C., C., C. & St. L. Ry. Co., R., 97.
Ans., L. S. & M. S. Ry. Co., R., 101.

5.

THE PROCEEDING IN COURT DE NOVO.

The following are a few of the cases on this point:

The courts have the power to hear these cases upon "other issues, pleadings, and facts than those presented to the Commission."

(*I. C. C.* v. *C., N. O. & T. P. Ry. Co.*, 56 Fed. Rep., pp. 934, 935.)

Congress intended in these cases "to vest in the courts a large discretion," and it is the duty of the courts as courts of equity "to do justice in the premises."

(*I. C. C.* v. *C., N. O. & T. P. Ry. Co.*, 64 Fed. Rep., top p. 985.)

"The court is not the *mere executioner of the orders of the Commission*," but "the suit is an original and independent proceeding," and "the court is not confined to a mere examination of the matter as heard by the Commission, but proceeds to hear the complaint *de novo*."

(*Shinkle, &c., Co.* v. *L. & N. R. R. Co.*, 62 Fed. Rep., p. 693.)

(See also *I. C. C.* v. *Southern Pac. Co. et al.*, 123 Fed. Rep., p. 601.)

6.

THE COURT NOT CONFINED TO GROUNDS TAKEN BY THE COMMISSION.

It is immaterial whether the Commission based its order on the ground that the advanced rates, C. L. and L. C. L., did not maintain the proper *relation* between C. L. and L. C. L. soap, or upon the ground that the advanced rate on soap L. C. L. was unreasonable in itself and subjected soap L. C. L. to an undue prejudice or disadvantage.

In *Southern Pacific Co.* v. *Interstate Commerce Commission* it was objected on the part of the defendants that the Circuit Court had no authority to decree the enforcement of the order involved in that case upon any other ground than that taken by the Commission itself. The court, in overruling this objection, says:

"We think that the court was not confined to those grounds" (grounds named by the Commission), "and if the court found the rule was, in itself, *for any reason*, illegal as a violation of the act, the order might be valid and be a lawful order, although the Commission *gave a wrong reason for making it. If it held the rule to be a violation of one section, the order to desist might be valid, if, instead of the section named by the Commission, the court should find that the rule was a violation of another section of the act.*"

(*Southern Pacific Co.* v. *I. C. C.*, 200 U. S., bot. p. 556.)

7.

The reasonableness of the class 3 less 20 per cent rate was the controlling issue. The former rate being presumed, from its long maintenance,

to be reasonable, and no valid excuse having been given for the advance, the advanced rate must be presumed to be unreasonable.

8.

The gravamen of the complaint was THE INCREASED RATES THEMSELVES. If the relation between the rates was considered by the Commission as justifying the order, it was only one ground. There were others.

9

The suit in court was on the order. The order may be said to be the cause of action. The order forbids the class 3 less 20 per cent rate itself and does not forbid the maintenance of any relation between the C. L. and L. C. L. rates as being unlawful.

Respectfully submitted.

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